UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

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| NATALIE LINDSEY and DAVID ZEWINSKI as attorneys in fact for ELIZABETH ZEWINSKI,<br><br>Plaintiffs<br><br>v.<br><br>THOMAS BARTON, M.D., *et. al.*,<br><br>Defendants | Civil No. 98-217-P-C |

GENE CARTER, District Judge

**MEMORANDUM OF DECISION AND ORDER**

Currently before the Court are various motions regarding the calculation and entry of judgment in this case following a jury verdict in favor of Plaintiffs. In particular, Defendant Barton has filed both a Motion Regarding the Calculation of Judgment to be Entered (Docket No. 142) and a Motion Requesting Certification to the Maine Law Court (Docket No. 143). Plaintiffs have filed a Motion for Entry of Judgment (Docket No. 146). The Court invited these motions in an effort to resolve the legal issues raised by the jury verdict.

## I. PROCEDURAL HISTORY

This action was commenced by a Complaint by the Plaintiffs Natalie Lindsey and David Zewinski against Defendants Dr. Barton, Dr. X, Dr. Y,[1] and York Hospital. The Plaintiffs sought damages resulting from alleged malpractice during the treatment of their mother, Elizabeth Zewinski.[2] The Complaint alleged that during the course of Elizabeth Zewinski's treatment, she developed a spinal abscess that was not diagnosed until it had already caused irreversible paralysis.

After a jury had been empaneled, but prior to the commencement of trial, Dr. Y and Dr. X reached settlements with Plaintiffs. As a consequence of these settlements, Defendant York Hospital was dismissed with prejudice (Docket No. 122). Because the jury had been introduced to all Defendants during jury selection, the first jury was excused and a second jury was selected. While Dr. Y and Dr. X remained named Defendants following their settlements, each waived any right to participate in the proceedings as named Defendants.[3] Accordingly, the second jury was not

[1] These two doctors have settled with Plaintiffs. They have requested that the Court refrain from using their names in this opinion, consistent with the confidentiality agreements reached as part of their respective settlements. None of the other parties have objected to this request. Accordingly, the Court will refer to these two doctors as Dr. X and Dr. Y throughout the opinion.

[2] As the caption reveals, Natalie Lindsey and David Zewinski are attorneys in fact for their mother, Elizabeth Zewinski.

[3] While not participating as Defendants, Dr. Y and Dr. X each testified during trial.

told that Dr. Y and Dr. X were Defendants, or that they had reached settlements with Plaintiffs. The second jury was also not told that York Hospital had previously been a Defendant.

During the course of trial, the Court, Plaintiffs, and Defendant Barton considered the interplay of Defendant Barton's rights to apportionment pursuant to 14 M.R.S.A. § 163,[4] and to contribution pursuant to 14 M.R.S.A. § 156.[5] Plaintiffs argued that the rights were mutually

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[4] In relevant part, 14 M.R.S.A. § 163 (1980) provides:

> Evidence of settlement with a release of one or more persons causing the injury shall not be admissible at a subsequent trial against the other person or persons also causing the injury. After the jury has returned its verdict, the trial judge shall inquire of the attorneys for the parties whether such a settlement or release has occurred. If such settlement or release has occurred, the trial judge shall reduce the verdict by an amount equal to the settlement with or the consideration for the release of the other persons.

[5] In relevant part, 14 M.R.S.A. § 156 (1980) provides:

> In a case involving multi-party defendants, each defendant shall be jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. However, any defendant shall have the right through the use of special

exclusive, such that if Defendant Barton chose to have a special verdict form submitted that apportioned the fault among the three doctors, he was then precluded from seeking contribution, and vice versa. *See Stacey v. Bangor Punta Corp*., 108 F.R.D. 72 (D. Me. 1985). Plaintiffs relied, at least in part, on the absence of cross-claims by Defendant Barton against either Dr. Y or Dr. X. After hearing oral arguments and reviewing submissions of case law, the Court concluded that the Law Court had expressly overruled *Stacey*. *See Lavoie v. Celotex Corp*., 505 A.2d 481, 483 n.2 (Me. 1986). Accordingly, the Court determined that Defendant Barton was entitled to both apportionment and contribution, if he chose to pursue both rights.

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interrogatories to request of the jury the percentage of fault contributed by each defendant.

At the close of evidence, Defendant Barton chose to exercise his right of apportionment under section 163. Accordingly, a special verdict form was submitted to the jury that required the jury, if they found Dr. Barton negligent, to determine if either Dr. Y or Dr. X were negligent and to apportion the causative fault between Defendant Barton, Dr. X, and Dr. Y as necessary (Docket No. 139). After finding both Defendant Barton and Dr. X negligent, the jury assigned eighty-five percent of the fault to Defendant Barton, fifteen percent of the fault to Dr. X, and zero percent of the fault to Dr. Y. The jury determined that the total damages suffered by Elizabeth Zewinski were $2,100,000. After receiving the verdict, this Court inquired of Plaintiffs, pursuant to section 163, regarding the exact nature of the settlements with Dr. Y and Dr. X. Plaintiffs informed the Court that they had settled with Dr. Y for $1,000,000 and with Dr. X for $1,000,000.

## II. DISCUSSION

The Court is faced with the seemingly straightforward task of entering judgment in this medical malpractice action, following a jury verdict in favor of Plaintiffs. However, the interaction between Maine statutory and common law, in situations where some defendants in multi-party tort actions have settled, is somewhat complex.[6] Consequently, the Court must carefully navigate the relevant statutory scheme, along with the applicable common law principles, in order to enter an appropriate judgment in this case.

The first issue that must be resolved is the impact, if any, of Dr. Y's settlement with Plaintiffs in light of the jury's finding that Dr. Y was not negligent and did not cause any of the injuries suffered by Elizabeth Zewinski. Referring to settling defendants, section 163 requires that

[6] *See, generally*, Arlyn H. Weeks, *The Unsettling Effect of Maine Law on Settlement in Cases Involving Multiple Tortfeasors*, 48 Me. L. Rev. 77 (1996).

"[i]f such settlement or release has occurred, the trial judge shall reduce the verdict by an amount equal to the settlement with or the consideration for the release of the other persons." 14 M.R.S.A. § 163. At first blush, this provision would seem to require that the verdict in this case should be reduced by Dr. Y's settlement. But the jury's finding, by way of a special verdict form, that Dr. Y was not negligent and did not cause any injury to Elizabeth Zewinski alters the analysis.

The Law Court's holding in *Thurston v. 3K Kamper Ko., Inc.*, 482 A.2d 837 (Me. 1984), is particularly relevant here. After being injured by an exploding camper stove, the plaintiffs sued the manufacturer of the camper, the manufacturer of the stove, and the manufacturer of the gas regulator. *Id.* at 838. By an amended complaint, 3K Kamper, the dealer that sold the trailer, was added as a defendant. *Id.* Prior to trial, the plaintiffs settled with all defendants except 3K Kamper. *Id.* At trial, the jury found 3K Kamper liable to the plaintiffs on various grounds. *Id.* at 839. Additionally, the jury was asked to apportion fault among all of the defendants. *Id.* The jury found 3K Kamper to be 100 percent liable, and accordingly no fault was attributed to any of the settling defendants. *Id.* at 840 Initially, the trial court reduced the verdict by the amounts of the settlements, pursuant to section 163, but subsequently entered judgment for the full amount of the verdict. *Id.*

The Law Court concluded that the trial court's application of section 163 was correct with respect to settling defendants found by the jury to have no fault in the cause of the plaintiffs' injuries. *Id.* at 842. Specifically, the *Thurston* court held that "it is clear that the language of section 163 contemplates that a verdict not be reduced by the amount of settlements with parties who the verdict declares are without causative fault." *Id.* The court went on to point out that this result is a product of strategic decisions by defendant 3K Kamper.

Defendant's pre-trial strategy . . . amounts to a deliberate tactical maneuver by

> which the defendant hoped to gain by a reduction in the percentage of its liability. . . . By its willingness to have the jury apportion fault, 3K Kamper will not now be heard to complain of the unfavorable result.

*Id.*

The holding of *Thurston* is controlling in this case with respect to Dr. Y's settlement. Defendant Barton has tried to distinguish *Thurston* from the case at bar, but the Court is not persuaded by any of these attempts. On the contrary, the *Thurston* case is squarely on point. As in *Thurston*, the nonsettling Defendant here chose to have a special verdict form submitted to the jury to apportion fault among settling and nonsettling Defendants. As in *Thurston*, the jury found a settling Defendant, Dr. Y, to have no causative fault. Accordingly, as in *Thurston*, the amount of Dr. Y's settlement will not be used, pursuant to section 163, to reduce the verdict in entering judgment in this case.[7]

The *Thurston* case does not resolve, however, the impact of Dr. X's settlement on the calculation of the judgment in this case. Unlike the settling defendants in *Thurston*, and unlike Dr. Y, the jury found that Dr. X, the other settling Defendant, was at fault. Accordingly, at least some portion of the settlement between Plaintiffs and Dr. X will be used to reduce the verdict pursuant

[7] Defendant Barton has also argued that because both Drs. Y and X are insured by St. Paul Insurance Company, their settlements with Plaintiffs represent a "unitary transaction." According to Defendant Barton the unitary nature of this transaction renders the holding of *Thurston* inapplicable to Dr. Y's settlement. On the contrary, the mere coincidence that Dr. Y and Dr. X share the same insurance carrier has no relevance to the statutory treatment of each individual settlement with respect to the verdict in this case.

to section 163. It is not a matter of simple subtraction, however, because section 156 must also be considered in the calculation.

In mathematical calculations, the order of operations can lead to significantly different results. Section 163 calls for subtraction, while section 156 calls for apportionment. Depending on which order these two sections are applied, the result will differ.[8] The Law Court has acknowledged the impact of the order of these operations on at least two occasions. In *Dongo v. Banks*, 448 A.2d 885 (Me. 1982), the Law Court modified the judgment entered by the lower court to correct an erroneous calculation resulting from the application of sections 163 and 156. In a situation similar to the case at bar, the trial court in *Dongo* first reduced the verdict total by the amount of a settlement, pursuant to section 163. *Id.* at 894. Then the trial court apportioned the remaining amount in accordance with the special jury verdict pursuant to section 156. *Id.* The Law Court rejected this approach. Instead the Law Court instructed the lower court to apportion the verdict first, pursuant to section 156, and then apply the settlement against that part of the award apportioned to the settling defendant as required by section 163. *Id.* The Law Court recently reaffirmed this approach as the proper application, in concert, of sections 156 and 163. *See Peerless Division, Lear Siegler, Inc., v. United States Special Hydraulic Cylinders Corp.*, 1999 ME 189, ¶ 7 n.5, 742 A2d 906, 908 n.5.

Applying the principles of *Dongo* to this case leads to the following result. First, employ

[8] For illustrative purposes only, assume a starting total of 100 (representing a verdict). If we subtract 30 (representing an offset under section 163), and then calculate 60 percent of that sum (representing an apportionment under section 156), the result is 42. Alternatively, if we calculate 60 percent first, and then subtract 30, the result is 30.

section 156 – 15% of the $2,100,000 of the verdict, or $315,000, is allocated to Dr. X. The remaining 85% of the verdict, or $1,785,000, is allocated to Dr. Barton. Next, apply section 163 – Dr. X's apportionment of $315,000 is offset by his settlement of $1,000,000. The difference between Dr. X's apportionment, $315,000, and his settlement, $1,000,000, is $685,000. Under the holding in *Dongo*, this difference is applied to offset Defendant Barton's liability pursuant to section 163. Subtracting $685,000 from Defendant Barton's apportionment of $1,785,000, Defendant Barton's final share of the verdict would be $1,100,000.

Both parties agree that the above mechanical application of the principles of *Dongo* and *Peerless* to the facts of this case is correct. In fact, this is the exact outcome that Plaintiffs seek by their motion. Defendant Barton, however, offers two alternative criticisms of this result. First, Defendant Barton argues that Dr. Y's settlement must be included in this calculation as an additional offset. Under that approach, Defendant Barton would be liable for $100,000. As has already been discussed, however, Dr. Y's settlement will be ignored in calculating the judgment in this case under the holding of *Thurston*. Accordingly, Defendant Barton's first attack on the calculation of a judgment against him in the amount of $1,100,000 fails. Alternatively, Defendant Barton argues that the approach set forth in *Dongo* and *Peerless* should not be applied at all because Defendant Barton has not elected to exercise his rights under section 156.

As the Court understands it, Defendant Barton contends that the Court does not have the power to effectuate the jury's allocation of fault in the absence of a cross-claim or a separate claim for contribution. In other words, Defendant Barton contends that only he may choose to exercise the right of apportionment, and this Court is without power to implement the jury's determination of relative fault between Defendants without some further action by Defendant Barton. Under this theory, Defendant Barton contends that the Court has only the power to

implement the offset of settlements under the mandatory provision of section 163. Accordingly, Defendant continues, the verdict should be offset by both settlements, leaving a $100,000 judgment against Defendant Barton.[9]

Given the procedural posture of this case, Defendant Barton's argument is unpersuasive. During the course of trial, at the urging of Defendant Barton, the Court concluded that Defendant Barton had a right both to offset and apportionment, despite the absence of cross-claims. As a result, Defendant Barton was allowed to submit a special verdict form to the jury. The Court will not now permit Defendant Barton to argue that the Court does not have the power to effectuate a remedy that Defendant Barton successfully argued for during trial, and which he elected to pursue at the close of the evidence. Defendant Barton will not be heard to change his position regarding the availability of this remedy, simply because he received an unfavorable result from the jury.[10]

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[9] Once again, this argument is premised on the erroneous conclusion that Dr. Y's settlement will be offset under section 163. As the Court has already established, the plain holding of *Thurston* dictates otherwise.

[10] As Plaintiffs point out, even if the Court were to accept Defendant Barton's change of position on this issue, the ultimate result does not change. Under the application of *Dongo* in the text above, the final judgment against Defendant Barton is $1,100,000. If the Court accepted Defendant Barton's position, and applied only section 163, the verdict of $2,100,000 would be reduced by the amount of Dr. X's settlement, $1,000,000, for a final judgment against Dr. Barton of $1,100,000. Under either approach, Dr. Y's settlement is ignored per the holding of *Thurston,* and under either approach, the judgment against Defendant Barton will be the same.

Finally, Defendant Barton has raised the issue of offsetting collateral source payments. As Defendant Barton properly points out, Maine law provides for the reduction of judgments to reflect certain collateral source payments. 24 M.R.S.A. § 2906 (West Supp. 1999). Defendant Barton has requested an evidentiary hearing to determine if there are any collateral source payments that should be deducted from this judgment in accordance with Maine law. In particular, Defendant Barton seeks a finding with respect to a check that was provided to the Plaintiffs by York Hospital prior to the commencement of litigation, apparently in an effort to resolve any claims against the hospital. Testimony at trial indicated that the check was never cashed, and the Court is aware of no evidence to the contrary. The Court is satisfied, without need of an additional evidentiary hearing, that the check was not cashed, and it is, therefore, not a collateral source payment under Maine law. Plaintiffs' attorney has represented to the Court that the only other possible collateral source payments implicating section 2906 would be from Medicare Part A. Affidavit of Julian L. Sweet, Docket No. 152. Plaintiffs are in the process of resolving the balance of payments with Medicare. The Court urges the parties to resolve this remaining issue so that an evidentiary hearing on Medicare payments may be avoided.[11]

## III. CONCLUSION

[11] The Court understands that the resolution of this issue may depend, in part, on the resolution of a forthcoming motion from Plaintiffs regarding attorney's fees. Affidavit of Julian L. Sweet, ¶ 5.

The issues raised in determining a judgment in this case, while complicated, are not without clear guidance from Maine statutory and common law. Accordingly, there is no need to certify any of these matters for consideration before the Law Court, as urged by Defendant Barton. As dictated by the analysis set forth above, judgment should be entered against Defendant Barton in the amount of $1,100,000, less any collateral source payments as required by section 2906.[12] Finally, Plaintiffs' claims against Defendants Y and X should be dismissed with prejudice.

Accordingly, it is hereby **ORDERED** that Defendant Barton's Motion Regarding the Calculation of Judgment to be Entered, be, and it is hereby, **GRANTED**, to the extent it is consistent with this Order, and in all other respects **DENIED**. It is further **ORDERED** that Defendant Barton's Motion Requesting Certification to the Maine Law Court be, and it is hereby, **DENIED**. Finally, it is **ORDERED** that Plaintiffs' Motion for Entry of Judgment be, and it is hereby, **GRANTED** to the extent is it consistent with this Order, and in all other respects **DENIED**.[13]

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GENE CARTER
District Judge

[12] Plaintiffs have urged the Court to enter judgment in the amount of $2,100,000, and then reduce the judgment to $1,100,000 against Dr. Barton. The Court infers that Plaintiff seeks this form of a judgment, at least in part, so as to be awarded prejudgment interest on the larger amount. Section 163 requires that the verdict be reduced by settlements in order to determine a final judgment. Accordingly, the Court will enter the reduced amount as the judgment, as opposed to the verdict amount. In addition to the statutory basis for entering judgment in the amount of $1,100,000, it is also equitable to require that Defendant Barton be responsible only for the prejudgment interest on that portion of the verdict for which he is ultimately responsible.

[13] Final judgment will be entered by further order of this Court following the resolution of the remaining collateral source payment issue.

Dated at Portland, Maine this 17th day of February, 2000.